IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 17548 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE R.H.SHUKLA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SHAH SHIVLAL BHOGILAL & 1 - Petitioner(s)
Versus
SONI DINESHKUMAR CHHOTALAL - Respondent(s)

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Appearance :
MR ASHISH H SHAH for Petitioner(s) : 1 - 2.
MR MB GANDHI for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.H.SHUKLA

Date : 19/28.12.2007

ORAL JUDGMENT

1. The present petition has been filed by the petitioners – original defendants, challenging the impugned order passed in Civil Misc. Appeal No. 49 of 2002 by the learned 3rd Joint District Judge, Banaskantha dated 17.6.2003, setting aside the order passed below application exh.5 and exh. 16 in Regular Civil Suit No. 67 of 2001 by the learned Civil Judge (JD), Sihori and granting the prohibitive injunction restraining the defendants from making construction of the shop and also directing to maintain status quo with regard to the disputed subject matter, till hearing of the suit.

2. The short facts of the case briefly summarised are that the respondent herein – original plaintiff filed Regular Civil Suit No. 67 of 2001 against the present

petitioners – original defendants in the Court of learned Civil Judge (JD), Sihori for permanent injunction along with application exh. 5 for restraining the defendants from making construction of the shop for commercial purpose on Plot Nos. 149 to 151 of Survey No. 4 and 5 of village Sadurjivas (Khara). The plaintiff had purchased the residential Plot No. 146 by a registered sale deed dated 17.12.1995 from defendant no.1, and therefore, the suit was filed for the injunction restraining the defendants from making construction of the shop for commercial purpose in adjoining or surrounding plots.

2.1 The ad interim injunction was granted below application exh.5. Thereafter application exh.16 was filed by the defendants for vacation and modification of the ex parte injunction granted, and accordingly, as per the order passed below

exh. 16 dated 1.1.2002 the order was passed vacating the interim relief directing to maintain status quo and also kept the application exh.5 for hearing on merits, with a rider that the defendant shall make the construction as per the approved plan. It is against this order Civil Misc. Appeal No. 49 of 2002 was filed by the original plaintiff on 26.8.2002 along with application exh. 5 and the order was passed in Appeal dated 29.8.2002, again directing to maintain status quo as on 29.8.2002. It is also required to be mentioned that in this order below exh. 5 in Civil Misc. Appeal No. 49 of 2002, it was also reflected that the learned Civil Judge (JD), Sihori had stayed the operation of the order till 27.8.2002 and, therefore, the interim relief remained in existence right from filing of the suit on 1.12.2001 to 27.8.2002.

3. After the bipartite hearing on application

exh. 5 in Civil Suit No. 67 of 2001 as well as application exh.16 the order was passed by the learned Civil Judge (JD), Sihori dated 16.8.2002, vacating the order of status quo and rejecting the application exh.5 and disposing of the application exh. 16. The said order is produced at Annexure-C. Thereafter the Appeal being Civil Misc. Appeal No. 49 of 2002 was filed as stated above, with application exh. 5, and after bipartite hearing in the Appeal also, the appellate Court, i.e. the learned 3rd Joint District Judge, Banaskantha, passed an order dated 17.6.2003, allowing the Appeal and setting aside the order below application exh. 5 in Civil Suit No. 67 of 2001 passed by the learned Civil Judge (JD), Sihori, restraining the defendants from making any further construction and also directing to maintain the status quo.

4. The present petition, therefore, has been

filed, challenging the said order passed by the learned 3rd Joint District Judge in Civil Misc. Appeal No. 49 of 2002 dated 17.6.2003 on the ground inter alia that the order passed by the trial Court is against the law and material and it is also contended that the trial Court has erred in not finding that the construction of the shop on the disputed place were as per the revised plan, and the revised plan was sanctioned by the Taluka Development Officer, Taluka Panchayat vide order dated 29.6.2001. The objections were raised by the plaintiff, and therefore, it has been contended that the construction sought to be made by the defendants as per the revised plan and only internal plaster and the flooring of the shop remains. It is also contended that the trial Court ought to have considered and held the balance of convenience in favour of the defendants in view of the fact that the majority of the construction of the shop was already done.

5. Learned advocate Mr. S.M.Shah for the petitioner submitted that Plot No. 146 belong to the plaintiff whereas Plot No. 149, 150 and 151 belong to the defendant. The construction of the shop is made after the approval of the revised plan, approved by the competent authority, i.e. Panchayat, for which he referred to Annexure-C and submitted in light of this development that the Panchayat vide resolution no. 292 dated 29.9.2000 has approved the revised plan and the construction has been done. Therefore, the learned advocate Mr. Shah, referring to the order passed below application exh.5 in Civil Suit No. 67 of 2001 as well as application exh. 16, referred to these aspects and strenuously submitted that the plaintiff could not take the objection and infact he had taken the objection and thereafter the construction has been made according to the revised plan. It was also submitted that, as reflected and observed in

the order of the learned Civil Judge (JD), Sihori at Annexure-C, the plaintiff could have approached the Court earlier and if the construction was stopped, then it would cause more hardship, and, therefore, the learned Judge vacated the interim injunction. Therefore, the learned advocate Mr. Shah submitted that after the ex parte injunction was obtained on the incorrect and incomplete facts, the defendant had moved application exh. 16 for modification and thereafter the aforesaid order at Annexure-C was passed by the learned Civil Judge (JD), Sihori after hearing both the sides. It is against this order Civil Misc. Appeal No. 49 of 2002 was preferred and while passing the impugned order the learned appellate Court has not considered this aspect of primafacie case and the balance of convenience. Learned advocate Mr. Shah strenuously submitted that the appellate Court ought to have appreciated that the construction has been made as per

the revised plan on the plot belonging to the defendant to which the plaintiff cannot have any objection. Moreover, learned advocate Mr. Shah submitted that if the injunction is operated it would cause the loss to the defendant and the plaintiff has nothing to suffer. It is submitted that as the Plot Nos. 147, 149, 150, 151, which belong to the defendant, and if he has been making construction according to the revised plan sanctioned by the competent authority, the plaintiff cannot have any objection.

6. Learned advocate Mr. Shah, therefore, submitted that the appellate Court below ought to have considered the basic principle regarding the injunction, like primafacie case and balance of convenience. It was strenuously submitted that before passing the impugned order, the appellate Court ought to have examined whether any injury is caused to the plaintiff. It was submitted that while

considering this aspect, the appellate Court ought to have applied the principle correctly that if primafacie case and the balance of convenience and the comparative hardship are all in favour of the plaintiff (appellant) then only such an order could have been passed. Learned advocate Mr. Shah submitted that the scope of review in exercise of powers under Article 227 of the Constitution of India is also required to be considered. For that purpose, he referred to the judgment of the Hon'ble Apex Court reported in **AIR 2007 SC 1370 head note C** and emphasized the observations made therein that the powers of judicial review of High Court under Article 227 of the Constitution of India are very wide. It empowers High Court to ensure that the Courts and Tribunals, inferior to High Court, discharge their duties and obligations. Learned advocate Mr. Shah also referred to and relied upon the judgment of the Hon'ble Apex Court reported in **AIR 2003**

SC 3044, again referring to the scope of Article 227 of the Constitution of India and interference with the interlocutory orders passed by Courts subordinate to High Court. He pointedly referred to the observations made in paragraph 34. “Curtailment of revisional jurisdiction of the High Court does not take away. The constitutional jurisdiction of the High Court to issue a writ of certiorari to a civil Court nor the power of superintendence conferred on the High Court under Article 227 of the Constitution is taken away or whittled down. The power exists, untrammelled by the amendment in Section 115 of the CPC.” Learned advocate Mr. Shah also referred to and relied upon the judgment of the Hon'ble Apex Court reported in **1990 (Supp.) SCC 727** and pointedly referred to the observations at page 728 that the appellate court would not interfere with the exercise of discretion of the court and substitute its own. Therefore,

learned advocate Mr. Shah strenuously submitted that in light of these facts and material, when the trial Court had vacated the interim injunction after considering the principles regarding the injunction, the appellate Court could not have interfered and the impugned order passed in Civil Misc. Appeal No. 49 of 2002 by the learned 3rd Joint District Judge, Banaskantha (appellate court), is bad and illegal.

7. Learned advocate Mr. M.B.Gandhi for the defendant / original plaintiff referred to the record and emphasizing on the observations made in the order in Civil Misc. Appeal No. 49 of 2002 below application exh.5 dated 17.6.2003 and emphasized that, as observed and recorded in this order itself, the injunction has continued right from filing of the suit on 1.12.2001 till 27.8.2002, when the appeal was filed and the order below application exh.5 in Civil Misc.

Appeal No. 49 of 2002 was passed. Learned advocate Mr. Gandhi, therefore, submitted that there is no gap and the construction which has been made, are contrary to the law, and therefore, the appellate court has rightly considered the order passed below application exh.5 in Civil Suit No. 67 of 2001 by the leaned Civil Judge (JD), Sihori, setting aside the order vacating the injunction and restoring the injunction. Learned advocate Mr. Gandhi also referred to the record and referring to the observations in the order below application exh.5 and exh.16 dated 16.8.2002 passed by the learned Civil Judge (JD), Sihori and more particularly pages 32 and 33 and submitted that some construction was made even without sanction of the revised plan and it has been observed that it has no relevance to the present suit. More over it has been observed that if the construction is made as per the revised plan, there is no breach of any law

and on that basis, has vacated the injunction. However, learned advocate Mr. Gandhi submitted that the construction of the commercial nature in the residential area whether would be permitted, is required to be considered in the suit and the plaintiff who is having Plot No. 146, is affected by such construction, and therefore, has a right to file the suit. It was submitted that originally the land was non-agriculture and thereafter the permission is granted for construction. Learned advocate Mr. Gandhi, also submitted that the defendant, who is a builder, has already started the construction with the revised plan, and even after the suit, has made some construction. However, it was strenuously submitted that the injunction has been operating from the very beginning and therefore till the trial of the suit, this injunction has to be continued and the petition deserves to be dismissed. He also submitted that the balance of

convenience is more in favour of the plaintiff and it would not be compensated in terms of money. Learned advocate Mr. Gandhi also submitted that the scope of interference by the High Court in exercise of the powers under Article 227 of the Constitution of India is limited. For that purpose he referred to and relied upon the judgment of the Hon'ble Apex Court, reported in **AIR 1984 SC 38** and also judgment reported in **AIR 2004 (3) SCC 682**.

8. In Rejoinder, Learned advocate Mr. S.M.Shah submitted that the Court may consider that the admitted position is that Plot Nos. 147, 148, 150 and 151 belonged to the defendant and has absolute right to make the construction, more particularly, when the revised plan has been approved by the competent authority. He strenuously urged that the plaintiff has to show an injury, and therefore, while considering the impugned

order of the trial Court, the Court may examine this aspect. It was also submitted that if the construction is not allowed to be completed, the amount invested in the construction is blocked and the defendant suffers the loss, whereas the plaintiff has nothing to lose. He emphasized that the plaintiff has to not only show the prima-facie case and balance of convenience but also the hardship or the injury, and in the facts of the case the plaintiff has not been able to establish as shown and discussed in the order passed below application exh.5 in Civil Suit No. 67 of 2001 by the learned Civil Judge (JD), Sihori. Therefore, learned advocate Mr. Shah submitted that the impugned order passed by the appellate court is bad and illegal. Learned advocate Mr. Shah also referred to and relied upon the judgment of this Court (Coram: A.M.Kapadia,J), reported in **2002(2) GLR 1480** and submitted that, as observed in this judgment, the appellate

Court should not interfere with the exercise of discretion by trial Court unless the order is perverse or is passed against settled principles of law. Learned advocate Mr. Shah, therefore, submitted that in the facts of the present case the order passed by the learned Civil Judge (JD), Sihori below application exh.5, cannot be said to be perverse or against the basic principles, and therefore, the appellate Court could not have interfered with the findings, and the impugned order of the appellate Court, reversing the order of the trial Court, i.e. learned Civil Judge (JD), Sihori dated 16.8.2002 is bad and illegal. Therefore, the present petition deserves to be allowed. He also referred to the order of the High Court in Special Civil Application No. 11757 of 2003 and submitted that it has also been observed that the plaintiff had not approached the Court expeditiously and the construction of the shop has been over, and therefore, declined

to remand. Therefore, learned advocate Mr. Shah submitted that the present petition may be allowed and the order of the appellate Court, i.e. 3rd Joint District Judge, Banaskantha may be quashed and set aside.

9. In view of these rival submissions, it is required to be considered whether the impugned order passed by the appellate Court below application exh.5 in Civil Misc. Appeal No. 49 of 2002 dated 17.6.2003 calls for any interference in exercise of the jurisdiction under Article 227 of the Constitution of India.

10. For that, before referring to the factual aspects, much debate and submissions have been made by both the side with regard to the scope of interference by the High Court under Article 227 of the Constitution of India, is required to be considered. Learned advocate Mr. Gandhi submitted that, in exercise of the jurisdiction under Article 227 of the

Constitution of India, the scope is very limited. He referred to the two judgments of the Hon'ble Apex Court reported in **AIR 1984 SC 38** and **AIR 2004 (3) SCC 682**. However, the scope of exercise of jurisdiction under Article 227 of the Constitution of India by the High Court is no longer res integra, it has been time and again considered and discussed at length. The settled legal position has been reemphasized by the Hon'ble Apex Court in the judgments reported in **AIR 2007 SC 1370** and **AIR 2003 SC 3044** as well as other catena of decisions. The judgment of the Hon'ble Apex Court, reported in **AIR 2003 SC 3044** is with regard to the position as to the scope of petition under Article 227 of the Constitution of India in light of the amendment in the Code of Civil Procedure, whereby the revisional jurisdiction under Section 115 of Code of Civil Procedure was done away with. However, the petitions under Article 227 of the Constitution of India were

filed, and considering on the issue, the Hon'ble Apex Court has observed in paragraph 32 as under:

“32. The principles deducible, well-settled as they are, have been well summed up and stated by a two-Judges Bench of this Court recently in State through Special Cell, New Delhi v. Navjot Sandhu Afshan Guru and others, JT 2003 (4) SC 605, para 28. This Court held:

(i) the jurisdiction under Article 227 cannot be limited or fettered by any Act of the State Legislature;

(ii) the supervisory jurisdiction is wide and can be used to meet the ends of justice, also to interfere even with interlocutory order;

(iii) the power must be exercised sparingly, only to move subordinate courts and Tribunals within the bounds of their authority to see that they obey the law. The power is not

available to be exercised to correct mere errors (whether on the facts or laws) and also cannot be exercised "as the cloak of an appeal in disguise.”

11. Further in paragraph 38, referring to the position as prevailed after the amendment in Code of Civil Procedure, has been summarized referring to the scope of Article 226 / 227 of the Constitution of India and in paragraph 38(9), it has been observed as under:

“38(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the act, order or proceedings of the

subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate Court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case."

12. Further, it has been observed expressing the word of caution:

"39. Though we have tried to lay down broad principles and working rules the fact remains that the parameters for exercise of jurisdiction under Article-226 or 227 of the Constitution cannot be tied down in a straitjacket formula or rigid rules. Not less than often the High Court would be faced with dilemma. If it intervenes in pending

proceedings there is bound to be delay in termination of proceedings. If it does not intervene, the error of the moment may earn immunity from correction. The facts and circumstances of a given case may make it more appropriate for the High Court to exercise self-restraint and not to intervene because the error of jurisdiction though committed is yet capable of being taken care of and corrected at a later stage and the wrong done, if any, would be set right and rights and equities adjusted in appeal or revision preferred at the conclusion of the proceedings. But there may be cases where a stitch in time would save nine'. At the end, we may sum up by saying that the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the Judge."

13.Therefore, the submissions made by learned advocate Mr. Gandhi is with regard to narrow or limited scope of the exercise of powers under Article 227 of the Constitution of India cannot be accepted. Though there is no quarrel with regard to the proposition which has been sum up by the Hon'ble Apex Court and quoted herein above expressing a word of caution.

14.Therefore, in the facts of the case, it is required to be considered in light of the rival submissions and facts on record that, whether the impugned order passed by the appellate Court calls for any interference in exercise of powers under Article 227 of the Constitution of India. The admitted facts are that the plaintiff has purchased Plot No. 146 by a registered sale deed and the other Plots, being Plot Nos. 147, 148, 150 and 151 belonged to the defendant. Originally it was meant for residential purpose only.

Thereafter, the construction is sought to be made albeit after obtaining the sanction for the revised plan by the competent authority. However, if the injunction, which has operated and continued for all these years, is allowed to be vacated, and the order of the appellate Court is not confirmed, it would make the suit itself infructuous. The issue whether such permission and the revised plan could be granted or not, can be considered at the trial, including whether such a permission could have been granted, whether it was validly granted, are the issues, which can be decided at the trial. Therefore, on the one hand the plaintiff having filed this suit and having obtained the injunction, which was vacated, and therefore, having filed the Appeal being Civil Misc. Appeal No. 49 of 2002 with application exh.5, and the injunction is operating, as reflected in the order passed below application exh.5 in Civil Misc. Appeal

No. 49 of 2002, the order passed by the appellate Court in Civil Misc. Appeal No. 49 of 2002 cannot be said to be erroneous or perverse, which would call for interference in exercise of powers under Article 227 of the Constitution of India. The appellate Court has also specifically observed that the right of the plaintiff to restrain defendant from making the shops in the residential area cannot be affected and by such a construction it is likely to cause nuisance. The revised plan, which was submitted, there is a reference to the recital in the sale deed by which the plaintiff purchased Plot No. 146, that it was as per the original lay out plan meant for residential purpose, and therefore, it will also have to be considered as to whether by subsequent revision of the plan, permitting the construction of the shop on commercial basis, would be permissible.

15.The submission made by learned advocate Mr.

Shah, referring to the principles of grant of injunction, that the plaintiff has to show not only primafacie case but all the three ingredients have to be satisfied, and the appellate Court below has not considered these aspects, more particularly the hardship in terms of loss of money or the amount of money invested by the defendant, it would be held up, in my opinion is misconceived. The Court below has considered these aspects. Further the submission made by learned advocate Mr. Shah that the balance of convenience is more in favour of the defendant, which has not been appreciated, that the money invested by the defendant is blocked if the construction is not permitted whereas the plaintiff has nothing to lose, is misconceived and cannot be accepted. If the monetary considerations or the aspects are considered, on the other hand the right of the plaintiff is also required to be considered. There is a primafacie case, and

while considering the balance of convenience, one has to consider the rights of the rival parties, and if the submission of the learned advocate Mr. Shah is to be accepted, then after the construction is allowed to be completed, the rights of third party are intervened and ultimately it would meet with the fate accomplie and the plaintiff should be told that the suit has now become infructuous. That is not the purpose more particularly when injunction has been operating. Therefore, there is no quarrel with regard to the well accepted principles regarding grant of injunction that primafacie case, balance of convenience and comparative hardships are the relevant factors to be considered. However, it is required to be granted and applied depending upon the facts of each case and this criteria has to be applied to adjudge and appreciate the balance of convenience or the comparative hardship. The Hon'ble Apex Court in the reported

judgment, while discussing all these aspects, specifically observed that while considering the comparative hardship, if by grant of injunction the comparative hardship is more to the defendant, then injunction cannot be granted. Similarly, by refusing the injunction, if ultimately one of the parties to the litigation is to meet with the fate accomplie, to be told that the suit has become infructuous or that his situation is so reversible that no relief could be granted, then certainly it would be a case for granting injunction. However, in such a situation the balance is required to be maintained between the rival claims / rights of the parties. The criteria regarding grant of injunction has to be on the basis of appreciation of the material on record depending on facts of each case. In other words the established criteria regarding grant of injunction like primafacie case, balance of convenience, comparative hardship,

which are the relevant factors to be considered, are required to be appreciated and applied on the basis of the facts of each case. It is the application of such parameters or the criteria to a given set of facts in each case requiring the appreciation of the material and evidence on record and which is necessary for exercise of sound judicial discretion. The criteria for injunction is well established, well discussed but it is the principle or the guideline but its application in each set of circumstances is another matter where it depends upon the appreciation of material and facts of each case.

16. Therefore, the Hon'ble Apex Court as well as High Court, time and again, made a observation that no rigid formula can be laid down and it depends upon the judicial discretion, depending upon the facts of the case. In the facts of the present case,

therefore also, the situation which has prevailed or the injunction which has been operating for years, cannot be now vacated and the appellate Court below, has therefore passed the order, which is just and proper restoring the injunction, prohibiting further construction. Whether there was any further construction made even after the grant of injunction during the intervening period and as sought to be canvassed, only the plaster is remaining, is a matter of appreciation of the evidence at the trial, which should be decided on the basis of the material, including the report of the Court Commissioner made at the situation, and therefore, without any factual material, this Court cannot interfere with the impugned order passed by the appellate Court below.

17. The reliance placed by learned advocate Mr. Shah on a judgment of the High Court, reported in **2002 (2) GLR 1480** and also the

judgment of the Hon'ble Apex Court reported in **1990 (Supp.) SCC 727**, much emphasizing on the observation that the appellate Court will not interfere with the exercise of discretion by the trial Court unless the order is perverse. It is also required to be appreciated that this observation has been made in a case regarding electric supply. In the judgment reported in **1990(Supp.) SCC 727**, it is required to be appreciated that it was a case regarding the matter under the Trade Mark and there is no quarrel with regard to the principle that the appellate Court would not exercise the discretion or disturb the exercise of discretion of the trial Court and substitute its own. However, while applying the principles regarding the grant of injunction and appreciating the facts in a given case, if the trial Court has failed to apply either the criteria or the criteria is applied, but the appreciation of the facts like, balance of convenience, is erroneous,

then the appellate Court has to intervene to do the justice or to correct or set right to avoid such error getting immuned from correction. Infact as discussed herein above, while referring to the observation of the Hon'ble Apex Court in a judgment reported in **AIR 2003 SC 3044**, that is precisely focused by the Hon'ble Apex Court referring to the exercise of powers under Article 227 of the Constitution of India. The impugned order passed by the appellate Court below application exh.5 in Civil Misc. Appeal No. 49 of 2002 dated 17.6.2003 is just and proper and do not call for any interference in exercise of powers under Article 227 of the Constitution of India.

18. In view of the observations made herein above, the present petition deserves to be dismissed and is hereby stands dismissed. No order as to costs. Rule discharged. However, it would be open for the parties to move the

trial Court for expeditious hearing of the suit.

[R.H.SHUKLA,J]

Jayanti*